

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jan 08, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHAWN T.,¹

Plaintiff,

vs.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:20-cv-00036-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 14, 15

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 14, 15. The parties consented to proceed before a magistrate judge. ECF No. 8. The Court, having reviewed the administrative record and the parties' briefing,

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

1 is fully informed. For the reasons discussed below, the Court denies Plaintiff's
2 motion, ECF No. 14, and grants Defendant's motion, ECF No. 15.

3 JURISDICTION

4 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g).

5 STANDARD OF REVIEW

6 A district court's review of a final decision of the Commissioner of Social
7 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
8 limited; the Commissioner's decision will be disturbed "only if it is not supported
9 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
10 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
11 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
12 (quotation and citation omitted). Stated differently, substantial evidence equates to
13 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
14 citation omitted). In determining whether the standard has been satisfied, a
15 reviewing court must consider the entire record as a whole rather than searching
16 for supporting evidence in isolation. *Id.*

17 In reviewing a denial of benefits, a district court may not substitute its
18 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
19 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one
20 rational interpretation, [the court] must uphold the ALJ's findings if they are

1 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
2 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
3 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
4 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
5 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
6 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
7 *Sanders*, 556 U.S. 396, 409-10 (2009).

8 **FIVE-STEP EVALUATION PROCESS**

9 A claimant must satisfy two conditions to be considered “disabled” within
10 the meaning of the Social Security Act. First, the claimant must be “unable to
11 engage in any substantial gainful activity by reason of any medically determinable
12 physical or mental impairment which can be expected to result in death or which
13 has lasted or can be expected to last for a continuous period of not less than twelve
14 months.” 42 U.S.C. § 423(d)(1)(A). Second, the claimant’s impairment must be
15 “of such severity that he is not only unable to do his previous work[,] but cannot,
16 considering his age, education, and work experience, engage in any other kind of
17 substantial gainful work which exists in the national economy.” 42 U.S.C. §
18 423(d)(2)(A).

19 The Commissioner has established a five-step sequential analysis to
20 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §

1 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's
2 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in
3 "substantial gainful activity," the Commissioner must find that the claimant is not
4 disabled. 20 C.F.R. § 404.1520(b).

5 If the claimant is not engaged in substantial gainful activity, the analysis
6 proceeds to step two. At this step, the Commissioner considers the severity of the
7 claimant's impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers
8 from "any impairment or combination of impairments which significantly limits
9 [his or her] physical or mental ability to do basic work activities," the analysis
10 proceeds to step three. 20 C.F.R. § 404.1520(c). If the claimant's impairment
11 does not satisfy this severity threshold, however, the Commissioner must find that
12 the claimant is not disabled. 20 C.F.R. § 404.1520(c).

13 At step three, the Commissioner compares the claimant's impairment to
14 severe impairments recognized by the Commissioner to be so severe as to preclude
15 a person from engaging in substantial gainful activity. 20 C.F.R. §
16 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the
17 enumerated impairments, the Commissioner must find the claimant disabled and
18 award benefits. 20 C.F.R. § 404.1520(d).

19 If the severity of the claimant's impairment does not meet or exceed the
20 severity of the enumerated impairments, the Commissioner must pause to assess

1 the claimant's "residual functional capacity." Residual functional capacity (RFC),
2 defined generally as the claimant's ability to perform physical and mental work
3 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
4 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

5 At step four, the Commissioner considers whether, in view of the claimant's
6 RFC, the claimant is capable of performing work that he or she has performed in
7 the past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is
8 capable of performing past relevant work, the Commissioner must find that the
9 claimant is not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of
10 performing such work, the analysis proceeds to step five.

11 At step five, the Commissioner considers whether, in view of the claimant's
12 RFC, the claimant is capable of performing other work in the national economy.
13 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner
14 must also consider vocational factors such as the claimant's age, education, and
15 past work experience. *Id.* If the claimant is capable of adjusting to other work, the
16 Commissioner must find that the claimant is not disabled. 20 C.F.R. §
17 404.1520(g)(1). If the claimant is not capable of adjusting to other work, analysis
18 concludes with a finding that the claimant is disabled and is therefore entitled to
19 benefits. *Id.*

1 The claimant bears the burden of proof at steps one through four above.
2 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
3 step five, the burden shifts to the Commissioner to establish that 1) the claimant is
4 capable of performing other work; and 2) such work “exists in significant numbers
5 in the national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d
6 386, 389 (9th Cir. 2012).

7 **ALJ’S FINDINGS**

8 On June 26, 2018, Plaintiff applied for Title II disability insurance benefits
9 alleging a disability onset date of May 28, 2010.² Tr. 15, 122, 237-43. The
10 application was denied initially and on reconsideration. Tr. 153-55; Tr. 159-65.
11 Plaintiff appeared before an administrative law judge (ALJ) on August 14, 2019.
12 Tr. 35-111. On August 28, 2019, the ALJ denied Plaintiff’s claim. Tr. 12-34.

13 At step one of the sequential evaluation process, the ALJ found Plaintiff,
14 who met the insured status requirements through December 31, 2015, had not
15 engaged in substantial gainful activity from October 31, 2014 through December
16

17 ² Plaintiff previously applied for Title II benefits, which was denied on October 30,
18 2014, and was not appealed. Tr. 112-21. The ALJ found there was no basis for
19 reopening the prior claim and as such the relevant time period for the current
20 application began October 31, 2014. Tr. 15.

1 31, 2015. Tr. 17. At step two, the ALJ found that Plaintiff had the following
2 severe impairments: mood disorder/major depressive disorder, generalized anxiety
3 disorder, somatoform disorder, and post-traumatic stress disorder (PTSD). *Id.*

4 At step three, the ALJ found Plaintiff did not have an impairment or
5 combination of impairments that meets or medically equals the severity of a listed
6 impairment. Tr. 18. The ALJ then concluded that Plaintiff had the RFC to
7 perform a full range of work with the following limitations:

8 [Plaintiff could] understand, remember and carryout simple, routine
9 and/or repetitive work instructions and work tasks; [could] have
10 frequent contact with the public; [needed] a routine work setting with
11 little or no changes; no fast paced or strict production quota-type
12 work; and no independent decision-making or making decisions for
13 others.

14 Tr. 20.

15 At step four, the ALJ found Plaintiff was unable to perform any of his past
16 relevant work. Tr. 26. At step five, the ALJ found that, considering Plaintiff's
17 age, education, work experience, RFC, and testimony from the vocational expert,
18 there were jobs that existed in significant numbers in the national economy that
19 Plaintiff could perform, such as industrial cleaner, warehouse checker, and garment
20 sorter. Tr. 27. Therefore, the ALJ concluded Plaintiff was not under a disability,
as defined in the Social Security Act, from October 31, 2014 through December
31, 2015. *Id.*

1 On December 6, 2019, the Appeals Council denied review of the ALJ's
2 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for
3 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

4 ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying
6 him disability insurance benefits under Title II of the Social Security Act. Plaintiff
7 raises the following issues for review:

- 8 1. Whether the ALJ properly evaluated Plaintiff's symptom claims; and
- 9 2. Whether the ALJ properly evaluated the medical opinion evidence.

10 ECF No. 14 at 1.

11 DISCUSSION

12 A. Plaintiff's Symptom Claims

13 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
14 convincing in discrediting his symptom claims. ECF No. 14 at 3-5. An ALJ
15 engages in a two-step analysis to determine whether to discount a claimant's
16 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2.
17 "First, the ALJ must determine whether there is objective medical evidence of an
18 underlying impairment which could reasonably be expected to produce the pain or
19 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).
20 "The claimant is not required to show that [the claimant's] impairment could

1 reasonably be expected to cause the severity of the symptom [the claimant] has
2 alleged; [the claimant] need only show that it could reasonably have caused some
3 degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

4 Second, “[i]f the claimant meets the first test and there is no evidence of
5 malingering, the ALJ can only reject the claimant’s testimony about the severity of
6 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
7 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
8 omitted). General findings are insufficient; rather, the ALJ must identify what
9 symptom claims are being discounted and what evidence undermines these claims.
10 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)); *Thomas v.*
11 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
12 explain why it discounted claimant’s symptom claims). “The clear and convincing
13 [evidence] standard is the most demanding required in Social Security cases.”
14 *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r*
15 *of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

16 Factors to be considered in evaluating the intensity, persistence, and limiting
17 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
18 duration, frequency, and intensity of pain or other symptoms; 3) factors that
19 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
20 side effects of any medication an individual takes or has taken to alleviate pain or

1 other symptoms; 5) treatment, other than medication, an individual receives or has
2 received for relief of pain or other symptoms; 6) any measures other than treatment
3 an individual uses or has used to relieve pain or other symptoms; and 7) any other
4 factors concerning an individual's functional limitations and restrictions due to
5 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
6 404.1529(c). The ALJ is instructed to "consider all of the evidence in an
7 individual's record," to "determine how symptoms limit ability to perform work-
8 related activities." SSR 16-3p, 2016 WL 1119029, at *2.

9 The ALJ found that Plaintiff's medically determinable impairments could
10 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
11 statements concerning the intensity, persistence, and limiting effects of his
12 symptoms were not entirely consistent with the evidence. Tr. 21.

13 Plaintiff challenges only the ALJ's conclusion that the objective medical
14 evidence was inconsistent with Plaintiff's symptom complaints. ECF No. 14 at 4-
15 6. Plaintiff failed to challenge the other reasons the ALJ cited in support of his
16 finding that Plaintiff's symptom complaints were not entirely credible, thus, any
17 challenges are waived and the Court may decline to review them. *See Carmickle v.*
18 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008). However,
19 upon review, the Court finds that the ALJ provided specific, clear, and convincing
20 reasons, supported by substantial evidence, to support his finding. Tr. 21-23.

1 *1. Objective Medical Evidence*

2 The ALJ found Plaintiff's symptom complaints were inconsistent with the
3 objective evidence. Tr. 21. An ALJ may not discredit a claimant's symptom
4 testimony and deny benefits solely because the degree of the symptoms alleged is
5 not supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853,
6 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991);
7 *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch v. Barnhart*, 400 F.3d
8 676, 680 (9th Cir. 2005). However, the objective medical evidence is a relevant
9 factor, along with the medical source's information about the claimant's pain or
10 other symptoms, in determining the severity of a claimant's symptoms and their
11 disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. § 404.1529(c)(2).

12 Regarding Plaintiff's mental health symptoms, the ALJ found the objective
13 evidence is inconsistent with Plaintiff's allegations of disabling mental health
14 symptoms. Tr. 21. Plaintiff sought routine mental health treatment, during which
15 he reported improvement with treatment. *Id.* (citing Tr. 497, 504-05, 608, 610,
16 1170, 1193). Plaintiff only occasionally reported symptoms of depression or
17 PTSD, while more commonly reporting he was not experiencing depression or
18 nightmares. Tr. 21 (citing Tr. 603, 606, 1162, 1170, 1177). Plaintiff's mental
19 status examinations were generally unremarkable. Tr. 21 (citing Tr. 610, 613, 615,
20 617, 619, 1164-65, 1172, 1181, 1187).

1 Regarding Plaintiff's physical symptoms, the ALJ found the objective
2 evidence is inconsistent with Plaintiff's allegations of disabling gastrointestinal
3 symptoms. Tr. 22. Plaintiff's tests and imaging were benign, his pain was noted
4 as stable, and he was observed as being in no acute distress with only mild to
5 moderate abdominal/pelvic tenderness. Tr. 22 (citing Tr. 449, 483, 601, 604, 607-
6 08 610, 1350, 1354. While Plaintiff alleged weight loss due to diarrhea, medical
7 records demonstrated Plaintiff gained weight during the relevant period. Tr. 22
8 (citing Tr. 501, 1164, 1172).

9 While Plaintiff argues the overall record demonstrates he has severe mental
10 health limitations, and argues the ALJ improperly relied on Plaintiff's
11 nutritionist/gastroenterologist records as evidence of normal mental functioning,
12 Plaintiff does not address the multiple normal mental health examinations
13 discussed *supra*. Plaintiff further argues the ALJ erred in relying on Plaintiff's
14 testimony regarding his mental health symptoms, as the ALJ did not ask any
15 questions regarding his mental health symptoms. ECF No. 14 at 6. At the hearing,
16 Plaintiff's counsel questioned Plaintiff regarding what symptoms he was
17 experiencing during the relevant time, and Plaintiff reported only gastrointestinal
18 symptoms. Tr. 82-99. Even when asked if he had any additional symptoms that
19 had not already been discussed, Plaintiff responded he focuses on the
20 gastrointestinal symptoms because they are "horrible," and stated only that he had

1 depression and flashbacks of “some incidences” during the relevant time. Tr. 99-
2 100. On this record, the ALJ reasonably concluded that the objective evidence was
3 inconsistent with Plaintiff’s symptom complaints. This finding is supported by
4 substantial evidence and was a clear and convincing reason, combined with the
5 other reasons discussed herein, to discount Plaintiff’s symptoms complaints.

6 *2. Improvement with Treatment*

7 The ALJ found Plaintiff’s improvement with treatment was inconsistent with
8 his symptom claims. Tr. 21. The effectiveness of treatment is a relevant factor in
9 determining the severity of a claimant’s symptoms. 20 C.F.R. § 404.1529(c)(3)
10 (2011); *Warre v. Comm’r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006)
11 (determining that conditions effectively controlled with medication are not
12 disabling for purposes of determining eligibility for benefits); *Tommasetti v.*
13 *Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (recognizing that a favorable response
14 to treatment can undermine a claimant’s complaints of debilitating pain or other
15 severe limitations).

16 The ALJ noted that Plaintiff reported improvement in his mental health
17 symptoms during the relevant period. Tr. 21. Plaintiff reported his nightmares
18 stopped and his anxiety improved when his Prazosin was increased. Tr. 1162,
19 1170. He reported improvement in his depression, increased activity, and
20 improved appetite. Tr. 603, 606, 608. Plaintiff reported engaging in online college

1 classes during the period he reported improvement. Tr. 1168. Medical records
2 also noted Plaintiff had improving PTSD and depression symptoms with treatment.
3 *See, e.g.*, Tr. 394, 398, 438, 553, 579, 1172. On this record, the ALJ reasonably
4 concluded that Plaintiff's impairments when treated were not as limiting as
5 Plaintiff claimed. This finding is supported by substantial evidence and was a
6 clear and convincing reason to discount Plaintiff's symptoms complaints.

7 3. *Inconsistent Statements*

8 The ALJ found Plaintiff made inconsistent statements regarding his
9 symptoms. Tr. 21. In evaluating a claimant's symptom claims, an ALJ may
10 consider the consistency of an individual's own statements made in connection
11 with the disability-review process with any other existing statements or conduct
12 under other circumstances. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996)
13 (The ALJ may consider "ordinary techniques of credibility evaluation," such as
14 reputation for lying, prior inconsistent statements concerning symptoms, and other
15 testimony that "appears less than candid."). Moreover, evidence that the claimant
16 was motivated by secondary gain is sufficient to support an ALJ's rejection of
17 testimony. *Matney ex rel. Matney v. Sullivan*, 981 F.2d 1016, 1020 (9th Cir.
18 1992). Therefore, the tendency to exaggerate or engage in manipulative conduct
19 during the administrative process is a permissible reason to discount the credibility
20

1 of the claimant's reported symptoms. *Tonapetyan v. Halter*, 242 F.3d 1144, 1148
2 (9th Cir. 2001).

3 While Plaintiff alleges he has frequent nightmares, the ALJ noted the
4 medical records indicate Plaintiff reported not experiencing nightmares for several
5 months at a time. Tr. 21 (citing Tr. 1162). Plaintiff testified to having extreme
6 limitations during the hearing, but reported to his providers that he had
7 improvement in his symptoms with treatment, was returning to college, spending
8 time with others, and traveling. Tr. 22 (citing Tr. 497, 610, 613, 615, 617, 619,
9 1164-65, 1168, 1172, 1181, 1183, 1187, 1191). On this record, the ALJ reasonably
10 concluded that Plaintiff made inconsistent statements regarding his symptoms and
11 functioning. This finding is supported by substantial evidence and was a clear and
12 convincing reason to discount Plaintiff's symptoms complaints.

13 4. *Activities of Daily Living*

14 The ALJ found Plaintiff's activities of daily living were inconsistent with his
15 symptom complaints. Tr. 21. The ALJ may consider a claimant's activities that
16 undermine reported symptoms. *Rollins*, 261 F.3d at 857. If a claimant can spend a
17 substantial part of the day engaged in pursuits involving the performance of
18 exertional or non-exertional functions, the ALJ may find these activities
19 inconsistent with the reported disabling symptoms. *Fair*, 885 F.2d at 603; *Molina*,
20 674 F.3d at 1113. "While a claimant need not vegetate in a dark room in order to

1 be eligible for benefits, the ALJ may discount a claimant's symptom claims when
2 the claimant reports participation in everyday activities indicating capacities that
3 are transferable to a work setting" or when activities "contradict claims of a totally
4 debilitating impairment." *Molina*, 674 F.3d at 1112-13.

5 The ALJ noted Plaintiff took online college classes and reported socializing
6 with others and traveling, including helping work on a home on the trip, during the
7 relevant period. Tr. 21-22 (citing Tr. 603, 1154, 1168). Plaintiff reported being
8 "active" and having improved energy. Tr. 22 (citing Tr. 1154, 1189). In his
9 function report, Plaintiff reported he was able to: help care for pets; handle his own
10 personal care with some difficulties; prepare simple meals; help with some chores
11 when he was able to each week; shop; handle money with some forgetfulness;
12 drive; read and watch television, including researching and trying to learn new
13 things up to four hours per day, with some difficulties comprehending/retaining
14 things; and socialize by phone weekly and in person once per month. Tr. 307-17.
15 On this record, the ALJ reasonably concluded that Plaintiff's activities of daily
16 living were inconsistent with his symptom complaints.

17 The ALJ rejected Plaintiff's symptom claims for clear and convincing
18 reasons that are supported by substantial evidence.

B. Medical Opinion Evidence

Plaintiff challenges the ALJ's evaluation of the medical opinions of Ken Cogswell, Ph.D., and F.J. Reed, M.D. ECF No. 14 at 5-10.

For claims filed on or after March 27, 2017, new regulations apply that change the framework for how an ALJ must evaluate medical opinion evidence. *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20 C.F.R. § 404.1520c. The new regulations provide that the ALJ will no longer “give any specific evidentiary weight...to any medical opinion(s)...” *Revisions to Rules*, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R. § 404.1520c(a). Instead, an ALJ must consider and evaluate the persuasiveness of all medical opinions or prior administrative medical findings from medical sources. 20 C.F.R. § 404.1520c(a) and (b). The factors for evaluating the persuasiveness of medical opinions and prior administrative medical findings include supportability, consistency, relationship with the claimant (including length of the treatment, frequency of examinations, purpose of the treatment, extent of the treatment, and the existence of an examination), specialization, and “other factors that tend to support or contradict a medical opinion or prior administrative medical finding” (including, but not limited to, “evidence showing a medical source has familiarity with the

1 other evidence in the claim or an understanding of our disability program's policies
2 and evidentiary requirements"). 20 C.F.R. § 404.1520c(c)(1)-(5).

3 Supportability and consistency are the most important factors, and therefore
4 the ALJ is required to explain how both factors were considered. 20 C.F.R. §
5 404.1520c(b)(2). Supportability and consistency are explained in the regulations:

6 (1) *Supportability*. The more relevant the objective medical evidence
7 and supporting explanations presented by a medical source are to
8 support his or her medical opinion(s) or prior administrative medical
9 finding(s), the more persuasive the medical opinions or prior
10 administrative medical finding(s) will be.

11 (2) *Consistency*. The more consistent a medical opinion(s) or prior
12 administrative medical finding(s) is with the evidence from other
13 medical sources and nonmedical sources in the claim, the more
14 persuasive the medical opinion(s) or prior administrative medical
15 finding(s) will be.

16 20 C.F.R. § 404.1520c(c)(1)-(2). The ALJ may, but is not required to, explain how
17 the other factors were considered. 20 C.F.R. § 404.1520c(b)(2).³ However, when

18 _____
19 ³ The parties disagree over whether Ninth Circuit case law continues to be
20 controlling in light of the amended regulations, specifically whether an ALJ is still
required to provide specific and legitimate reasons for discounting a contradicted
opinion from a treating or examining physician. ECF No. 14 at 5-6; ECF No. 15 at
7-12. Plaintiff argues the ALJ was required to give specific and legitimate reasons
to reject the medical opinions under existing case law but did not present an

1 _____

2 argument as to how the existing case law still applies under the new regulations.

3 ECF No. 14 at 5-6. Defendant argues that because the new regulations apply, the

4 prior case law does not govern. ECF No. 15 at 7. Plaintiff did not respond to

5 Defendant’s arguments. The Court finds resolution of this question unnecessary to

6 the disposition of this case. “It remains to be seen whether the new regulations

7 will meaningfully change how the Ninth Circuit determines the adequacy of the an

8 ALJ’s reasoning and whether the Ninth Circuit will continue to require that an ALJ

9 provide ‘clear and convincing’ or ‘specific and legitimate reasons’ in the analysis

10 of medical opinions, or some variation of those standards.” *Allen T. v. Saul*, No.

11 EDCV 19-1066-KS, 2020 WL 3510871, at *3 (C.D. Cal. June 29,

12 2020) (citing *Patricia F. v. Saul*, No. C19-5590-MAT, 2020 WL 1812233, at *3

13 (W.D. Wash. Apr. 9, 2020)). “Nevertheless, the Court is mindful that it must defer

14 to the new regulations, even where they conflict with prior judicial precedent,

15 unless the prior judicial construction follows from the unambiguous terms of the

16 statute and thus leaves no room for agency discretion.” *Allen T.*, at *3 (citing *Nat’l*

17 *Cable & Telecomms. Ass’n v. Brand X Internet Services*, 545 U.S. 967, 981-82

18 (2005); *Schisler v. Sullivan*, 3 F.3d 563, 567-58 (2d Cir. 1993) (“New regulations

19 at variance with prior judicial precedents are upheld unless ‘they exceeded the

20 Secretary’s authority [or] are arbitrary and capricious.’”).

1 two or more medical opinions or prior administrative findings “about the same
2 issue are both equally well-supported ... and consistent with the record ... but are
3 not exactly the same,” the ALJ is required to explain how “the other most
4 persuasive factors in paragraphs (c)(3) through (c)(5)” were considered. 20 C.F.R.
5 § 404.1520c(b)(3).

6 *1. Dr. Cogswell*

7 On June 7, 2019, Dr. Cogswell, Plaintiff’s treating psychiatrist, provided an
8 opinion on Plaintiff’s functioning. Tr. 1737. Dr. Cogswell treated Plaintiff for
9 depression and PTSD from 2012 onward. *Id.* Dr. Cogswell stated Plaintiff has
10 been diagnosed with “serious gastrointestinal symptoms,” causing “unpredictable
11 bouts of both intense pain and diarrhea,” which impact Plaintiff’s activities and
12 affect his concentration, memory, and mood. *Id.* He opined Plaintiff’s depression
13 is often “crippling”; Plaintiff has at times struggled to care for himself; he
14 experiences PTSD symptoms including hypervigilance in public, nightmares,
15 intrusive thoughts and memories, and feelings of guilt; his PTSD and depression
16 symptoms prevent him from holding gainful employment; his symptoms interfere
17 with his concentration and memory; he would not be able to consistently follow
18 directions of any complexity; and his ability to consistently show up for work is
19 poor due to his physical and psychological symptoms. *Id.* The ALJ found Dr.
20 Cogswell’s opinion “unpersuasive.” Tr. 24.

1 First, the ALJ found Dr. Cogswell's opinion regarding Plaintiff's physical
2 symptoms was based on Plaintiff's self-report, which was not supported by the
3 evidence. *Id.* As supportability is one of the most important factors an ALJ must
4 consider when determining how persuasive a medical opinion is, 20 C.F.R. §
5 404.1520c(b)(2), a medical provider's reliance on a Plaintiff's unsupported self-
6 report is a relevant consideration when determining the persuasiveness of the
7 opinion. The ALJ noted Dr. Cogswell treated Plaintiff only for mental health
8 symptoms, thus any opinions regarding Plaintiff's physical symptoms must have
9 been based on Plaintiff's self-report. Tr. 24. The ALJ also noted most of Dr.
10 Cogswell's records during the relevant period contained recitations of Plaintiff's
11 subjective reports. *Id.* As discussed *supra*, the ALJ properly rejected Plaintiff's
12 symptom complaints. Plaintiff argues Dr. Cogswell's opinion is supported by the
13 evidence, but largely cites to his own self-report as evidence and fails to address
14 the ALJ's finding that the opinion was based too heavily on Plaintiff's self-report.
15 ECF No. 14 at 7. The ALJ's finding that Dr. Cogswell's opinion too heavily relied
16 on Plaintiff's properly discounted complaints was a specific and legitimate reason
17 to reject the opinion. *See Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219,
18 1228 (9th Cir. 2009); *Tonapetyan*, 242 F.3d at 1149.

19 Second, the ALJ found Dr. Cogswell's opinion regarding Plaintiff's mental
20 health symptoms was not supported by treatment notes. Tr. 24. Supportability is

1 one of the most important factors an ALJ must consider when determining how
2 persuasive a medical opinion is. 20 C.F.R. § 404.1520c(b)(2). The more relevant
3 objective evidence and supporting explanations that support a medical opinion, the
4 more persuasive the medical opinion is. 20 C.F.R. § 404.1520c(c)(1). The ALJ
5 noted Dr. Cogswell’s records contain minimal mental status examinations, but the
6 objective evidence within the records includes Plaintiff denying depression, notes
7 that he had stable symptoms, he completed college courses, he had good
8 grooming/hygiene, he was friendly and cooperative with normal eye contact, he
9 had a euthymic mood and full affect, and he had normal thoughts, speech,
10 orientation, memory, concentration, attention, and insight/judgment. Tr. 24 (citing
11 Tr. 600, 613, 615, 617, 619, 1164-65, 1172, 1181, 1187).

12 Plaintiff argues Dr. Cogswell’s opinion is supported by the medical records.
13 ECF No. 14 at 7-8. However, Plaintiff cites entirely to his self-reports that are
14 documented in the records. *Id.* Further, while the records cited to by Plaintiff
15 contain some abnormal findings such as reported nightmares, the records also
16 contain references to Plaintiff traveling to Oklahoma, though he had to return home
17 early, Tr. 1161, a provider noted Plaintiff “reported feeling anxious yet did not
18 appear so,” and that he reported having a nightmare for the first time in months, Tr.
19 1162, and even when reporting feeling anxious and having had a nightmare,
20 Plaintiff had a normal mental status examination, Tr. 1164-65. While Plaintiff

1 reported continuing depression and anxiety at multiple appointments, he also
2 reported improving symptoms and functioning, including reporting beginning and
3 successfully completing college courses, and he had normal mental status
4 examinations even at the appointments where he reported continuing symptoms.
5 Tr. 1172, 1177, 1181-82, 1185, 1187, 1189. The ALJ's finding that Dr.
6 Cogswell's opinion that Plaintiff has crippling symptoms that prevent him from
7 working are inconsistent with his treatment notes was a specific and legitimate
8 reason, supported by substantial evidence, to reject the opinion. *See Bray*, 554
9 F.3d at 1228; *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir.
10 2004); *Thomas*, 278 F.3d at 957; *Tonapetyan*, 242 F.3d at 1149; *Matney*, 981 F.2d
11 at 1019; *Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003).

12 Third, the ALJ found Dr. Cogswell's opinion was inconsistent with the
13 record as a whole. Tr. 24-25. Consistency is one of the most important factors an
14 ALJ must consider when determining how persuasive a medical opinion is. 20
15 C.F.R. § 404.1520c(b)(2). The more consistent an opinion is with the evidence
16 from other sources, the more persuasive the opinion is. 20 C.F.R. §
17 404.1520c(c)(2). The ALJ found Dr. Cogswell's opinion was not supported by the
18 benign mental status findings, including normal memory, concentration, and
19 attention. Tr. 24. The ALJ also noted Dr. Cogswell's opinion was not supported
20 by the medical records demonstrating improvement in Plaintiff's depression, sleep,

1 and nightmares. Tr. 25 (citing Tr. 497, 603, 606, 608, 1189). While Plaintiff
2 argues the record as a whole supports Dr. Cogswell's opinion, ECF No. 14 at 8, the
3 ALJ's finding that Dr. Cogswell's opinion that Plaintiff has crippling symptoms
4 that prevent him from working is inconsistent with the record as a whole was a
5 specific and legitimate reason, supported by substantial evidence, to reject the
6 opinion. *See Batson*, 359 F.3d at 1195.

7 Lastly, the ALJ found Dr. Nance's opinion more persuasive than Dr.
8 Cogswell's opinion as Dr. Nance's opinion is more consistent with other opinions
9 and more supported by the evidence. Tr. 25. Consistency and supportability are
10 the two most important factors when considering the persuasiveness of medical
11 opinions. 20 C.F.R. § 404.1520c(b)(2). The ALJ found Dr. Nance's opinion more
12 persuasive than Dr. Cogswell's opinion, as Dr. Nance had the opportunity to
13 review a more complete record, and provided more explanation for his opinion as
14 he was available for direct and cross-examination as a medical expert. Tr. 25. The
15 ALJ found Dr. Nance's opinion was supported by medical evidence, and consistent
16 with the State agency opinions. Tr. 23. The ALJ adopted Dr. Nance's opinion in
17 which he opined Plaintiff can understand, remember, and carryout simple, routine
18 and/or repetitive work instructions and work tasks; can have frequent contact with
19 the public; needs a routine work setting with little or no changes; no fast paced or
20 strict production quota-type work; and no independent decision-making or making

1 decisions for others. Tr. 22, 72-74. Dr. Nance provided an explanation for his
2 opinion that is supported by the record. Tr. 64-72. Plaintiff did not present any
3 argument regarding the ALJ's reliance on Dr. Nance's opinion over Dr. Cogswell's
4 opinion. The ALJ's reliance on Dr. Nance's opinion was a specific and legitimate
5 reason, supported by substantial evidence, to reject Dr. Cogswell's opinion. *See*
6 *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995); *Lester*, 81 F.3d at 831
7 (citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th Cir. 1989); *Roberts v.*
8 *Shalala*, 66 F.3d 179, 184 (9th Cir. 1995).

9 2. *Dr. Reed*

10 Dr. Reed, Plaintiff's primary care physician whom has treated Plaintiff since
11 2010, provided two opinions on Plaintiff's functioning. Tr.1341-43, 1769-73. On
12 October 29, 2018, Dr. Reed diagnosed Plaintiff with Crohn's disease with
13 complications, chronic abdominal pain, PTSD, and gastroesophageal reflex
14 disease. Tr. 1341. He opined Plaintiff's pain is worsened by exertion, it can be
15 severe and at its worst is debilitating; Plaintiff would need unscheduled breaks two
16 to three times per week, for four to six hours; he would be off-task more than 30
17 percent of the time; he would miss five or more days of work per month; he would
18 be able to efficiently perform a full-time job on a sustained basis less than 50
19 percent of the time; and Plaintiff's persistent inflammatory bowel disease was
20 unresponsive to immunosuppressants and his symptoms are very limiting. Tr.

1 1341-43. On August 2, 2019, Dr. Reed diagnosed Plaintiff with inflammatory
2 bowel disease. Tr. 1769. He opined Plaintiff's symptoms have unknown triggers
3 and are unpredictable, but can last days to weeks and are often severe; during a
4 symptom exacerbation, Plaintiff could walk one block, sit for one hour, stand for
5 two hours, stand/walk a total of about four hours, and would need to shift positions
6 at will; Plaintiff would need ready access to a restroom; he would need
7 unscheduled restroom breaks every 30 minutes, lasting 10 to 15 minutes each; he
8 would need unscheduled breaks four to five times daily, lasting 20 to 30 minutes
9 each; he cannot lift during a period of symptom exacerbation and otherwise can lift
10 less than 10 pounds occasionally, 10 pounds rarely, and never higher weight;
11 during a period of exacerbation, he can rarely twist, stoop, crouch, squat, or climb;
12 during an exacerbation period, he would be off-task 25 percent of the time or more,
13 he would be capable of low stress work, and he would miss four or more days per
14 month. Tr. 1769-72. The ALJ found Dr. Reed's opinions unpersuasive. Tr. 25.

15 First, the ALJ found Dr. Reed's opinion was based on Plaintiff's self-report.
16 *Id.* As supportability is one of the most important factors an ALJ must consider
17 when determining how persuasive a medical opinion is, 20 C.F.R. §
18 404.1520c(b)(2), a medical provider's reliance on a Plaintiff's unsupported self-
19 report is a relevant consideration when determining the persuasiveness of the
20 opinion. The ALJ found Dr. Reed opined about matters to which he had no

1 personal knowledge, including opining Plaintiff would be off-task, he would need
2 frequent breaks, he would be absent and unable to maintain
3 attention/concentration, and as such the opinions were based more on Plaintiff's
4 self-reported symptom allegations than objective evidence. Tr. 25. The ALJ also
5 noted the objective evidence does not support Dr. Reed's opinion, which further
6 supports a finding that Dr. Reed's opinion is based on Plaintiff's self-report. *Id.*
7 Plaintiff argues Dr. Reed did not base his opinion on Plaintiff's self-report, but
8 rather based it on his treatment of Plaintiff, and that the CT scans and biopsies
9 provide objective evidence to support the opinion. ECF No. 14 at 9 (citing Tr.
10 1769-70). Dr. Reed noted a CT demonstrated bowel wall thickening, Tr. 1341, and
11 there were abnormalities from a colon biopsy and abdominal CT scans, Tr. 1769.
12 However, State agency consultant Howard Platter, M.D., also noted the abnormal
13 findings on CT, including the thickening, and he opined Plaintiff could perform
14 light work, Tr. 146-47. As discussed further *infra*, Dr. McKracken also testified
15 that Dr. Reed's opinion is not supported by objective evidence. Tr. 51-53. As
16 such, the ALJ's conclusion that Dr. Reed's opinion is not supported by the
17 objective findings is a reasonable interpretation of the medical evidence. The
18 ALJ's finding that Dr. Reed's opinion relied on Plaintiff's properly rejected
19 complaints was a specific a legitimate reason, supported by substantial evidence, to
20

1 reject Dr. Reed's opinion. *See Bray*, 554 F.3d at 1228; *Tonapetyan*, 242 F.3d at
2 1149.

3 Second, the ALJ found Dr. Reed's opinion was not supported by the
4 objective evidence. Tr. 25. Supportability is one of the most important factors an
5 ALJ must consider when determining how persuasive a medical opinion is. 20
6 C.F.R. § 404.1520c(b)(2). The more relevant objective evidence and supporting
7 explanations that support a medical opinion, the more persuasive the medical
8 opinion is. 20 C.F.R. § 404.1520c(c)(1). The medical records show Plaintiff was
9 generally in no acute distress; he had generally normal mental status examinations;
10 he had only some mild to moderate abdominal tenderness/fullness; he had a normal
11 gait and no motor or neurological abnormalities; he gained weight during the
12 relevant period; and he reported eating well, being active, and having improved
13 energy and increased strength. Tr. 25 (citing, *e.g.*, Tr. 449, 483, 497, 501, 603,
14 606, 735, 738, 741-42, 744, 1191). While Plaintiff argues that the length and
15 nature of Dr. Reed's relationship with Plaintiff confirms the consistency of his
16 opinion with the evidence, Plaintiff does not address the lack of objective evidence
17 in the record to support the opinion. ECF No. 14 at 9. Further, supportability and
18 consistency are the relevant considerations; an ALJ is only required to explain how
19 the additional considerations set forth in the new regulations, such as relationship
20 with a provider, were considered if the ALJ finds that there are two opinions that

1 are equally supported and consistent. *See* 20 C.F.R. § 404.1520c(b)(2), (3). As the
2 ALJ did not find Dr. Reed's opinion was equally supported and as consistent with
3 the evidence as Dr. McKenna's opinion, the ALJ was not required to address Dr.
4 Reed's relationship with Plaintiff. *Id.* The ALJ's finding that Dr. Reed's disabling
5 opinion was inconsistent the objective evidence was a specific and legitimate
6 reason, supported by substantial evidence, to reject the opinion. *See Bray*, 554
7 F.3d at 1228; *Batson*, 359 F.3d at 1195; *Thomas*, 278 F.3d at 957; *Tonapetyan*, 242
8 F.3d at 1149; *Matney*, 981 F.2d at 1019; *Connett*, 340 F.3d at 875.

9 Third, the ALJ found Dr. McKenna's opinion more consistent with the
10 evidence than Dr. Reed's opinion. Tr. 25. Consistency is one of the most
11 important factors an ALJ must consider when determining how persuasive a
12 medical opinion is. 20 C.F.R. § 404.1520c(b)(2). The more consistent an opinion
13 is with the evidence from other sources, the more persuasive the opinion is. 20
14 C.F.R. § 404.1520c(c)(2). The ALJ found Dr. McKenna's opinion was more
15 persuasive, as he had access to the complete record, he testified at the hearing and
16 gave an explanation for his opinion, and his opinion is more consistent with the
17 evidence than Dr. Reed's opinion. Tr. 25. Dr. McKenna testified that Plaintiff
18 carried a historical diagnosis of terminal ileitis but the imaging during the relevant
19 period was normal, and the diagnosis was amended to presumed Crohn's disease.
20 Tr. 42 (citing Tr. 678). However, the testing for Crohn's was also negative, and

1 follow-up testing was normal. Tr. 43-44. There was also a period when Plaintiff
2 had an amended diagnosis of irritable bowel syndrome. Tr. 44 (citing Tr. 679).
3 Dr. McKenna testified the objective evidence did not corroborate the underlying
4 diagnosis of Crohn's, but there is evidence of a history of stress-related irritable
5 bowel syndrome, and Plaintiff had continued psychogenic stress-related irritable
6 bowel symptoms. Tr. 49-50. Dr. McKenna opined Plaintiff did not have a severe
7 physical medically determinable impairment prior to the date last insured, as there
8 is not objective evidence to establish an impairment. Tr. 51-53. He specifically
9 addressed Dr. Reed's opinion, and stated there is not objective evidence to support
10 the opinion. Tr. 53. Plaintiff did not present any argument regarding the ALJ's
11 reliance on Dr. McKenna's opinion over Dr. Reed's opinion. The ALJ's reliance
12 on Dr. McKenna's opinion was a specific and legitimate reason, supported by
13 substantial evidence, to reject Dr. Reed's opinion. *See Andrews*, 53 F.3d at 1041.

14 The ALJ properly considered the factors set forth in the new regulations and
15 provided specific and legitimate reasons, supported by substantial evidence, to
16 reject Dr. Cogswell and Dr. Reed's opinions. Plaintiff is not entitled to remand on
17 these grounds.

1 **CONCLUSION**

2 Having reviewed the record and the ALJ's findings, the Court concludes the
3 ALJ's decision is supported by substantial evidence and free of harmful legal error.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

6 2. Defendant's Motion for Summary Judgment, **ECF No. 15**, is **GRANTED**.

7 3. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

8 The District Court Executive is directed to file this Order, provide copies to
9 counsel, and **CLOSE THE FILE**.

10 DATED January 8, 2021.

11 s/Mary K. Dimke

12 MARY K. DIMKE

13 UNITED STATES MAGISTRATE JUDGE
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